

MAYER BROWN LLP

Edward D. Johnson (SBN 189475)

wjohnson@mayerbrown.com

Donald M. Falk (SBN 150256)

dfalk@mayerbrown.com

Eric B. Evans (SBN 232476)

eevans@mayerbrown.com

Two Palo Alto Square, Suite 300

3000 El Camino Real

Palo Alto, CA 94306-2112

Telephone: (650) 331-2000

Facsimile: (650) 331-2060

Matthew H. Marmolejo (SBN 242964)

mmarmolejo@mayerbrown.com

350 S. Grand Avenue, Suite 2500

Los Angeles, CA 90071

Telephone: (213) 229-9500

Facsimile: (213) 625-0248

Sarah E. Reynolds (admitted *pro hac vice*)

sreynolds@mayerbrown.com

71 S. Wacker Drive

Chicago, IL 60606

Telephone: (312) 782-0600

Facsimile: (312) 701-7711

Attorneys for Defendant Google Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RICK WOODS, Individually and On Behalf
of Others Similarly Situated

Plaintiff,

v.

GOOGLE INC.,

Defendant.

CASE NO. 5:11-CV-01263-EJD

**DEFENDANT GOOGLE INC.'S
MOTION TO SET A CASE SCHEDULE
PURSUANT TO FED. R. CIV. P. 16**

Date: August 20, 2015

Time: 9:00 a.m.

Place: Courtroom 4, 5th Floor

Judge: Hon. Edward J. Davila

1 **NOTICE OF MOTION & MOTION FOR RULE 16 SCHEDULING ORDER**

2 Please take notice that on August 20, 2015 at 9:00 a.m., before the Honorable Edward J.
 3 Davila, Defendant Google Inc. will and hereby does move under Federal Rule of Civil Procedure
 4 16 and the Court's inherent power to control its docket to "secure the just, speedy and
 5 inexpensive determination of each action," Fed. R. Civ. P. 1, to enter a case schedule that
 6 minimizes the unnecessary expenditure of Court and party resources before the Court's decision
 7 on Google's dispositive Motion for Summary Judgment. In particular, Google respectfully
 8 requests that this Court enter Google's proposed scheduling order deferring all briefing on class
 9 certification until after the resolution of the pending summary judgment motion, which will be
 10 fully briefed by August 6—less than one month from now. The proposed order also provides for
 11 an efficient and orderly conclusion to fact and expert discovery if the case is not resolved on
 12 summary judgment. Google's motion is based on this Notice, the accompanying Memorandum
 13 of Points and Authorities, arguments of counsel, and any other matter that the Court deems
 14 appropriate.

15 **STATEMENT OF ISSUE TO BE DECIDED**

16 Whether this Court should enter a case schedule that recognizes the potentially
 17 dispositive nature of Google's Motion for Summary Judgment, and accordingly defers the issue
 18 of class certification until the logically antecedent question of whether—and to what extent—any
 19 of Woods's claims survive is resolved.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 Defendant Google has moved for summary judgment on Plaintiff Rick Woods's claims
 22 based on the evidence adduced in discovery, including fatal admissions made during Woods's
 23 deposition. (Dkt. 205.) If successful, that motion will end this case—and at a minimum, the
 24 motion is likely to substantially narrow the number and scope of any potential classes Woods
 25 may seek to certify.

26 Any remaining proceedings in this case should be structured to take account of the
 27 dispositive nature of Google's motion and prevent the unnecessary expenditure of resources on
 28 issues that may never need to be addressed. As this Court has recently explained on more than

1 one occasion, “Defendant’s motion [for summary judgment] must be decided first because, if
2 that motion is granted and summary judgment . . . is entered in favor of Defendant, the
3 certification motion is rendered moot.” *Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-cv-
4 03067-EJD, 2015 WL 859491, at *2 (N.D. Cal. Feb. 26, 2015); *see also Khasin v. Hershey Co.*,
5 Case No. 5:12-CV-01862-EJD, 2014 WL 1779805, at *2 (N.D. Cal. May 5, 2014) (“When early
6 resolution of a motion for summary judgment is likely to protect both the parties and the court
7 from needless and costly litigation, it is reasonable to consider such a motion before class
8 certification.”).

9 In that light, any class certification briefing or proceedings while this dispositive motion
10 is pending would be unduly burdensome because they may be rendered moot by the outcome on
11 summary judgment. To avoid this potential waste of time and resources, and in an attempt to
12 streamline the parties’ efforts over the coming months, Google has proposed a schedule that
13 would defer any class certification proceedings until after this Court decides the pending
14 summary judgment motion. This proposal is consistent with the decisions of courts in this
15 Circuit and across the country, which routinely stay class certification briefing pending the
16 outcome of a dispositive summary judgment motion. The proposal also provides for an orderly
17 conclusion to discovery should the case continue past summary judgment.

18 BACKGROUND

19 The parties filed their Fourth Amended Joint Case Management Statement (“JCMS”) on
20 April 15, 2015. (Dkt. 202). Google indicated in the JCMS that it would soon be filing a
21 dispositive motion for summary judgment, and explained why “Google’s Motion for Summary
22 Judgment should be heard and decided in advance of any class certification motions.” (Dkt. 202,
23 at 5-7, 11.) Woods, by contrast, indicated his intent to file a motion for class certification. (*Id.* at
24 11.)

25 The following week, Google filed its summary judgment motion. (Dkt. 205.) The
26 hearing on that motion is set for August 20, the earliest date that Plaintiff was available. Because
27 that August hearing date was set in April, the parties agreed to a briefing schedule for summary
28

1 judgment that has given each side ample time to file its respective opposition or reply (Dkt. 209),
2 and the Court granted the stipulation (Dkt. 210).

3 Like the summary judgment motion, this motion to set a case schedule is also set for
4 hearing on August 20. Google respectfully submits that, as a matter of good order and judicial
5 economy, this Court should enter an order setting a schedule for the balance of this case—
6 including class certification briefing and closing out fact or expert discovery—that is keyed to
7 the resolution of the summary judgment motion.

8 **ARGUMENT**

9 Consistent with the Court’s inherent authority “to achieve the orderly and expeditious
10 disposition of cases,” *Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d
11 363, 368 (1992), Federal Rule of Civil Procedure 16, “the central pretrial rule, authorizes a court
12 to manage cases so that disposition is expedited, [and] wasteful pretrial activities are
13 discouraged” *Travis v. Folsom Cordova Unified Sch. Dist.*, No. 2:06-CV-02074-MCE-
14 EFB, 2007 WL 1821465, at *2 (E.D. Cal. June 25, 2007).

15 Precisely in order to prevent “wasteful pretrial activities,” Fed. R. Civ. P. 16(a), Google’s
16 pending Motion for Summary Judgment should be heard and decided in advance of any class
17 certification briefing or proceedings. Rule 23(c)(1) of the Federal Rules of Civil Procedure
18 provides broad discretion for a trial court to rule on the merits of an individual plaintiff’s claims
19 before class certification proceedings. Indeed, the rule formerly required a class certification
20 determination “as soon as practicable after commencement of an action,” but now requires a class
21 certification determination only “at an early practicable time.” Fed. R. Civ. P. 23(c)(1). The
22 advisory committee notes to the 2003 amendments make clear that this was a substantive change,
23 designed to “reflect[] prevailing practice” and “capture[] the *many valid reasons* that may justify
24 deferring the initial certification decision”—including the situation here, where “the party opposing
25 the class . . . prefer[s] to win dismissal or summary judgment as to the individual plaintiff[] without
26 certification.” Fed. R. Civ. P. 23 advisory committee’s note (emphasis added). After all, a plaintiff
27 who has no viable claims cannot represent a class, and in that case there is no reason for needless
28 and costly class certification proceedings.

1 It is therefore unsurprising that on multiple occasions this Court has concluded that,
 2 before addressing class certification, it should resolve a motion that will decide whether the
 3 named plaintiff can proceed with the case at all. *Major*, 2015 WL 859491, at *2 (granting
 4 summary judgment motion before addressing class certification because “if that motion is
 5 granted and summary judgment . . . is entered in favor of Defendant, the certification motion is
 6 rendered moot”); *see also Khasin*, 2014 WL 1779805, at *2 (deciding summary judgment before
 7 class certification). Moreover, this Court’s conclusion finds ample support in Ninth Circuit
 8 precedent. Even before the 2003 amendments to Rule 23, the Ninth Circuit held that “the district
 9 court has discretion to rule on a motion for summary judgment before it decides the certification
 10 issue.” *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984); *see also id.* (collecting cases
 11 from “several other circuit courts” that “have affirmed summary judgment for a defendant where
 12 no ruling has been made as to the class”). As the court of appeals has recognized in rejecting a
 13 plaintiff’s argument “that it was improper for the district court to decide the merits of the case
 14 prior to a ruling on class certification,” an “early resolution of [the] motion for summary
 15 judgment seem[s] likely to protect both the parties and the court from needless and costly further
 16 litigation.” *Kim v. Commandant, Defense Language Inst., Foreign Language Ctr.*, 772 F.2d 521,
 17 524 (9th Cir. 1985) (internal citation omitted). After the 2003 amendments, the Ninth Circuit
 18 again explicitly rejected a plaintiff’s argument “that the district court should have ruled on his
 19 motion for class certification before addressing Defendant’s motion for summary judgment.”
 20 *Saeger v. Pac. Life Ins. Co.*, 305 F. App’x 492, 492 (9th Cir. 2008). And because Ninth Circuit
 21 law is so clear, other courts in this Circuit have similarly decided summary judgment motions
 22 before entertaining the issue of class certification.¹

23
 24 ¹ *See, e.g., Burden v. SelectQuote Ins. Servs.*, 2011 WL 2885016, at *1 (N.D. Cal. July 19,
 25 2011) (noting that if defendant’s position in its summary judgment motion “is correct, all of
 26 [plaintiff’s] claims fail and his motion for class certification will become moot”); *Colvin v.*
 27 *Citigroup Global Mkts., Inc.*, 2009 WL 1657331, at *1 (N.D. Cal. June 11, 2009) (denying
 28 plaintiff’s motion to vacate case management order that called for briefing and decision on a
 summary judgment motion before any class certification proceedings, because “Ninth Circuit
 law is clear that a district court may rule on the merits before ruling on a motion for class
 certification.”).

1 Leading treatises further support the conclusion that it is appropriate to resolve a motion
2 for summary judgment prior to class certification. “The court may rule on motions pursuant to
3 Rule 12, Rule 56, or other threshold issues before deciding on certification.” MANUAL FOR
4 COMPLEX LITIGATION § 21.133 (4th ed. 2005); *see also* 7B WRIGHT, MILLER & KANE, FEDERAL
5 PRAC. & PROC., CIVIL 3d § 1798 (3d ed. 2005) (stating that a “[d]efendant . . . may move for
6 summary judgment prior to the class certification”); HERBERT B. NEWBERG AND ALBA CONTE,
7 NEWBERG ON CLASS ACTIONS § 7:3 (4th ed. 2002) (discussing moving for dismissal or summary
8 judgment prior to class determination).

9 Because of the undeniable efficiencies that result from resolving a dispositive summary
10 judgment motion before turning to class certification, courts across the country routinely grant
11 the very relief Google is seeking: *i.e.*, they defer all class certification briefing until after a ruling
12 on a motion for summary judgment on the named plaintiff’s individual claims. For instance, in
13 *Talley v. NCO Fin. Sys.*, 2006 WL 2927596 (N.D. Ind. Oct. 12, 2006), the court “order[ed] that
14 briefing on Plaintiff’s Motion to Certify Class is hereby stayed,” explaining that when, as here,
15 “the Defendant’s Motion for Summary Judgment will be fully briefed shortly,” “it is in the
16 interests of judicial economy and efficiency for the Court to rule on the motion for summary
17 judgment prior to the motion for class certification in order to determine whether the claim of the
18 named Plaintiff lacks merit and thus whether the motion for class certification is moot.” *Id.* at
19 *1-2 (emphasis omitted). And in *Good v. Altria Group*, 231 F.R.D. 446 (D. Me. 2005), the court
20 firmly rejected the plaintiffs’ attempts to “decry the Defendant’s motion [to stay class
21 certification briefing]” as “part of a strategy of needless delay.” *Id.* at 446. To the contrary, the
22 court explained, “[j]udicial economy” as well as the 2003 amendments to Rule 23—and the
23 conclusions of many courts that a defendant’s motion for summary judgment should be decided
24 before class certification—all pointed in favor of “grant[ing] the motion to stay.” *Id.* at 447. As
25 the court further observed, “[i]f the motion is granted, the stay will have saved time and
26
27
28

1 expense”; and “[i]f not, the stay will have been only for the time necessary to rule on the
2 motion.” *Id.*²

3 The same result is warranted here. It would waste the time and efforts of both parties to
4 engage in premature class certification briefing that is almost certain to be of no help to the
5 Court. If this Court grants summary judgment, Plaintiff’s bid to represent a class is “rendered
6 moot” (*Major*, 2015 WL 859491, at *2)—making all of the time and expense expended on class
7 certification briefing a complete waste. And even if the case is not dismissed in full, the
8 summary judgment ruling is likely to narrow substantially the remaining claims and theories at
9 issue in the case—and thus narrow the potential number and scope of potential classes.

10 Put another way, any class certification briefing submitted before this Court decides the
11 motion for summary judgment would likely address issues and theories that will no longer be in
12 the case (if the case survives at all). As a result, the class certification briefs would address
13 irrelevant issues and otherwise may not match up with the case as it stands after the summary
14 judgment ruling. Indeed, the parties might have to rebrief class certification to the extent that
15 any of Woods’s claims survive summary judgment but are modified in scope or substance.
16 Rather than force the parties to engage in such a potentially duplicative and wasteful effort, the
17 Court should streamline the proceedings by entering the proposed order deferring class
18 certification briefing until after a decision on the summary judgment motion.

19 In addition, the Court should impose an orderly schedule for the conclusion of fact and
20 expert discovery that could go into effect if the case is not resolved on summary judgment.

21
22 ² Numerous other courts have followed suit. *See, e.g., Maestas v. Day & Zimmerman,*
23 *LLC*, 2010 WL 5625914, at *1 (D.N.M. Nov. 30, 2010), *aff’d in part and reversed in part on*
24 *other grounds*, 664 F.3d 822 (10th Cir. 2012) (“Plaintiffs filed a second motion to certify a class
25 for a collective action, . . . but the Court stayed briefing on that motion pending a decision on
26 Defendants’ motion for summary judgment.”); *Haney v. USAA Cas. Ins. Co.*, 331 F. App’x 223,
27 226 (4th Cir. 2009) (noting that in the district court, the defendants “filed motions for summary
28 judgment and successfully sought to stay briefing on [plaintiff’s] motions regarding class
certification pending resolution of the dispositive motions.”); *McGinnis v. T-Mobile USA, Inc.*,
2009 WL 4824002, at *2 (W.D. Wash Dec. 9, 2009) (noting that the court “had stayed the
briefing on the motion for class certification” pending resolution of motions for summary
judgment).

CONCLUSION

Google respectfully requests that the Court enter an order (a) deferring class certification briefing and proceedings until disposition of Google's pending summary judgment motion, and (b) to the extent the case is not fully disposed of on summary judgment, setting a schedule providing for class certification briefing and an orderly close to fact and expert discovery.

DATED: July 10, 2015

Respectfully submitted,

MAYER BROWN LLP

/s/ Edward D. Johnson

EDWARD D. JOHNSON
DONALD FALK
ERIC B. EVANS
MATTHEW H. MARMELEJO
SARAH E. REYNOLDS

Attorneys for Defendant Google Inc.